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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 15

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNUP AND SIMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 208–219) is reported at 322 F. 2d 57. The decision and order of the Board (R. 51–64, 28–41) are reported at 137 NLRB 766.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1963, and a decree was entered on November 14, 1963 (R. 208, 227–230). The petition for certiorari was filed on November 20, 1963, and granted on January 13, 1964 (R. 231). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge an employee engaged in solicitation for union membership because of a mistaken belief that the employee engaged in misconduct in the course of that union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 35–36.

STATEMENT

This is an unfair labor practice proceeding arising from the layoff of three employees, Robert J. Davis, Joseph H. Harmon and John P. McKnight, and the subsequent discharge of two of them—Davis and Harmon. The facts found by the National Labor Relations Board are undisputed:

Respondent is engaged in Florida in the manufacture, sale and installation of concrete, concrete blocks, ready-mixed concrete and related products (R. 28–29). On September 21, 1961, a number of truckdrivers working at respondent's plant in Melbourne, Florida, staged a walkout in support of a demand for a wage increase. Employees Davis and Harmon were leaders of this action and McKnight was prominently involved. The men returned to work the same day (R. 51–52).

On the next day, September 22, Davis communicated with a local affiliate of the Teamster's Union,[1]

[1] Local Union No. 172, Airline Supply Technicians, affiliated with Internation Brotherhood of Teamsters (R. 29).

which undertook to attempt to organize the plant (R. 32–34). On September 29, 1961, Davis, Harmon and McKnight were laid off by respondent, allegedly because economic factors forced a cut-back in personnel (R. 52). Thereafter Davis and Harmon actively engaged in efforts on behalf of the Union to organize employees at the Melbourne plant. In the course of these activities, they both solicited employees at their homes (R. 59–60; 86; 92–93; 100–101).

On October 13 or 14, 1961, Tawney, the superintendent of the Melbourne plant, was told by an employee, named Pate, that Davis and Harmon had made threats against Company property while soliciting Pate, at Pate's home, to sign a union authorization card. Tawney reported the conversation with Pate to Moritz, respondent's Plant Manager (R. 34). On October 25, after talking with respondent's counsel, Pate gave respondent an affidavit describing the alleged solicitation by Davis and Harmon and stating that, "towards the end of the talk, Davis said: 'If the Union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bin over and make sure that no one works.' Harmon was right there at that time, but didn't add anything to Davis' statement." (R. 34–35.)

Respondent made no further investigation of Pate's charges (R. 59). On November 8, 1961, Moritz sent identical letters of discharge to Davis and Harmon, which read as follows (R. 35; 201; 202):

> When you were laid off on September 29, 1961, it was with the understanding that busi-

> ness in your particular job was slow and that you would have "first call" on any job that came available once business picked up.
>
> Business is now picking up, but I regret to advise you that I cannot re-employ you.
>
> It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company.

McKnight, who was not discharged at this time, was subsequently taken back on the job and eventually discharged for good cause (R. 53, 58).

The Board concluded that the September 29 layoffs of Davis, Harmon and McKnight had been made in retaliation for their roles in the walkout and had constituted discriminations against the leaders of the walkout, thus violating Section 8(a)(1) of the National Labor Relations Act (R. 51–58). The Board also concluded that Sections 8(a) (1) and (3) of the Act had been violated by the November 8 discharges of Davis and Harmon. The Board found in this regard that Pate's allegations against Davis and Harmon, which had been the sole basis for the dismissals, were in fact untrue and that Davis and Harmon had actually made no threats against Company property in the course of soliciting Pate (R. 59–60).[2] The solicitation of Pate,

[2] The Board here relied on the categorical denials under oath of Davis and Harmon, on Pate's failure to testify, and on the absence of any other proof tending to establish the truth of Pate's charges (R. 60). The Trial Examiner had not reached the contrary conclusion (R. 40).

moreover, was a "protected activity" under the Act (R. 60–61). In these circumstances—that is, where discharges were based upon alleged employee misconduct taking place in the course of protected activity and where it affirmatively appeared that the misconduct did not, in fact, occur—the Board rejected the view that respondent's mere "honest belief" in the truth of the accusation against Davis and Harmon furnished a sufficient defense to the unfair labor practice charges. The Board held further that Pate's allegations had merely been a pretext for penalizing Davis and Harmon for their union activity (R. 60–61).[3] The Board's order required respondent, *inter alia,* to cease and desist from the unfair labor practices, to offer reinstatement to Davis and Harmon, and to make Davis, Harmon and McKnight whole for any loss of pay resulting from the discrimination against them.

On petition for enforcement of the Board's order, the court of appeals enforced the portion of the Board's order relating to the September 29 layoffs, holding that there was substantial evidence to support the Board's finding that the layoffs were discriminatorily motivated. (R. 209–210; 211; 219.) The court, however, declined to sustain the Board's finding that the discharges of Harmon and Davis had violated the

[3] The Board said that, in view of respondent's knowledge that Davis and Harmon had been engaged in a protected activity and in view of respondent's prior discriminatory layoff of Davis and Harmon, "we can only conclude that, because of their union activity, Respondent seized up their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges." (R. 61).

Act and it therefore refused enforcement of the remainder of the Board's order. (R. 213–219.) Although accepting the Board's finding that Davis and Harmon had not in fact engaged in misconduct, the court was of the view that a "good faith belief" that an employee has engaged in misconduct "is sufficient reason to discharge him no matter what the circumstances." (R. 217–218.) The court found further that the employer in this case had a "good faith" belief that Davis and Harmon had threatened to dynamite the plant and that the motivation for their discharges had been "to rid the plant of those from whom the threat was believed to have emanated." (R. 214.) The court thus rejected the Board's rule relating to mistaken discharges of employees engaged in protected activity. It also apparently overruled without discussion the Board's finding of fact that Pate's allegations had not been the real reason for the discharges, but had merely been a pretext for penalizing Davis and Harmon for their union activity (R. 61).

SUMMARY OF ARGUMENT

A. The Board's order in this case was a reasonable exercise of its power under Section 8(a)(1) of the National Labor Relations Act to prevent undue interference with employee freedom to engage in concerted activities. The rule which the Board seeks to have the Court sustain holds that a discharge is an unfair labor practice, despite the employer's "good faith," when the General Counsel demonstrates (1) that the discharged employee was known by the employer to have been engaging in protected union

activity, (2) that the reason for the discharge was an allegation that the employee committed an act of misconduct in the course of the protected activity, and (3) that, in fact, the employee was innocent of the alleged misconduct. It is easily demonstrated that, in the cases where this rule applies, the mistaken discharge of an employee for engaging in protected activity would be very likely to interfere with employee freedom to engage in collective activity. Although this fact alone would not justify the Board in holding such a discharge to be an unfair labor practice if the employer could point to business considerations which, on balance, were entitled to prevail over the employee rights involved, there is no strong legitimate employer interest in the narrow circumstances where the Board's rule applies. The rule is thus a proper accommodation of the competing interests. On the other hand, the view of the court of appeals that a "good faith belief" that an employee has engaged in misconduct "is sufficient reason to discharge him no matter what the circumstances" would encourage precipitous "good faith" discharges of employees engaged in protected activity and would thereby seriously impair the employee freedoms guaranteed in Section 7 of the Act.

B. The Board believes that its order in this case can also rest upon its power under Section 8(a)(3) of the Act to prevent "discrimination" which has the effect of discouraging union activity. The cases in which this Court has affirmed Board findings of violations of Section 8(a)(3) do not require the Board

to find that the employer was motivated either by a desire to discourage unionism or by a desire to treat union members differently from others. The cases do, however, contain a common thread which also runs through the present case: employees have been unjustifiably rewarded or penalized as a direct result of their participation in, or abstention from, union activity. The Board believes that this circumstance establishes a violation of Section 8(a)(3) here.

C. The Board's order may, in any event, be sustained on any of three alternative bases which are peculiar to this case. (1) Even if "good faith" were to be a sufficient defense to unfair labor practice charges growing out of mistaken discharges, the employer here was demonstrably not in "good faith." (2) The court of appeals below improperly overturned the Board's finding that the allegation of employee misconduct was merely a pretext for the discharges in this case. The Board properly found that the men here were actually discharged in retaliation for their union activity, thus clearly establishing violations of Sections 8(a) (1) and (3). (3) Even if no impropriety whatsoever had been connected with the *discharges* of the two men involved in this case, the Board's order reinstating them with back pay was proper as a remedy for respondent's prior action in laying them off to penalize them for union activity.

ARGUMENT

THE BOARD PROPERLY HELD THAT RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE BY MISTAKENLY DISCHARGING EMPLOYEES FOR ALLEGED MISCONDUCT COMMITTED IN THE COURSE OF PROTECTED ACTIVITY

INTRODUCTION

Although the National Labor Relations Act does not comprehensively regulate the conduct of employers in hiring and discharging their employees, it does subject the employment process to scrutiny in one important respect. However else an employer may wish to exercise his discretion in selecting employees, he must do it without unduly interfering with his employees' free choice to participate in collective activity. Section 8(a)(3) specifically makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) more generally makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," those rights being the rights "to self-organization" and "to form, join, or assist labor organizations." In enforcing these sections the Board is given power (Section 10(c)) to order "reinstatement of employees with or without back pay."

Typical cases arising under Sections 8(a)(3) and 8(a)(1) involve employees prominent in union activity who are discharged or laid off allegedly for causes unrelated to their union activity—for example, for malingering or for lacking capacity to do the job. In

such cases the Board ordinarily will determine whether the employer's motive in acting against the employee was the avowed good cause or whether the discharge was made in retaliation for the employee's union activity. In the latter event the Act is violated.[4] Another class of cases in which the same sections commonly come into play involves strikers who are discharged because of alleged strike misconduct—for example, for allegedly participating in an assault upon other employees while picketing the plant. Here, again, the Act is violated if the Board determines that the employer's actual motive in discharging a striker accused of misconduct was to penalize not the alleged misconduct, but the employee's participation in the strike.[5]

Cases of the type just described will ordinarily be satisfactorily disposed of in accordance with the Board's finding as to whether the employer was motivated by a desire to discriminate against union activity in effecting the discharge. There are discharge cases, however, in which the Board's power to protect the free exercise of employee rights under the Act would be inadequate if it were made to depend wholly upon a prior finding that the employer was motivated by anti-union bias. Suppose, for example, that an employee soliciting for the union in the plant is accused by a fellow employee of assault in the course

[4] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132.

[5] See *National Labor Relations Board* v. *Hill & Hill Truck Line*, 266 F. 2d 883, 887 (C.A. 5).

of the solicitation. The accused employee is thereupon fired. Suppose further that, despite the accusation, the accused employee was in fact innocent of the assault; he was the victim either of a malicious accusation or the case was one of mistaken identity. In such a situation, the Board may well find no positive evidence to demonstrate that the employer did not act on the basis of the false accusation. Nevertheless, if the discharge is permitted to stand, it may be just as effective as a conscious discrimination in repressing the free exercise by the remaining employees of their Section 7 rights. Those employees would be quite likely to conclude, despite the Board's ultimate failure to find deliberate anti-union bias, that the alleged "misconduct" was nothing but a pretext and that the discharge flowed directly from the employee's innocent engagement in union activity. Moreover, should an employer involved in a heated labor dispute realize that he can properly seize upon alleged misconduct to fire a union member engaged in protected activity regardless of whether the misconduct actually took place, a temptation would exist to act too swiftly upon unsupported allegations, thus further discouraging the free exercise of Section 7 rights.

Accordingly the Board has concluded through a series of decisions that, in limited circumstances, the Act permits it to find an unfair labor practice in a discharge case involving alleged misconduct without a prior explicit finding of anti-union motivation. The rule applies when employees are discharged for misconduct arising out of protected activity and when it is shown that the misconduct never in fact occurred;

in such cases the Board finds an unfair labor practice despite the employer's subjective "good faith." The rule thus places the risk of error upon employers in circumstances where mistaken discharges would be likely to have especially repressive effects upon the free exercise of Section 7 rights.

The Board's rule was first announced in *Mid-Continent Petroleum Corporation*, 54 NLRB 912, 932–934, where a large number of strikers were discharged for allegedly engaging in a sit-down in the plant. Eighteen of the men asserted that, in fact, they had not participated in the sit-down. The employer contended that, "even though it be established that these 18 strikers did not participate in the sit-down phase of the strike, nevertheless if the respondents [the employer], in good faith, believed that they did, and for this reason discharged them, their action in so doing was not violative of the Act." The Board rejected this contention, holding instead that, "[o]nce it is pleaded, as in the case here, that the discharge was made for unlawful conduct inseparably connected with the strike, the burden was on the respondents to show that all the striking employees discharged therefor had, in fact, been guilty of unlawful conduct * * *." The rule was reaffirmed in *Standard Oil Company of California*, 91 NLRB 783, 790–791, where the Board said that "[t]o hold otherwise would be to place employees who engage in lawful strike activities with the hope of returning to their jobs at the end of the economic struggle at the mercy of an employer who may sincerely regard their conduct as unlawful. * * * [A]n employer, who discharges a striker on the ground

that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly." Subsequently, in *Rubin Brothers Footwear, Inc.*, 99 NLRB 610, the Board slightly modified the rule so as to make lighter the employer's burden of proof. Previous cases had placed an affirmative burden upon the employer to prove that the discharged employee was in fact guilty of the misconduct. In *Rubin Brothers, supra* at 611, the Board said that "[w]e are now of the opinion that the honest belief of an employer that striking employees have engaged in misconduct provides an adequate defense to a charge of discrimination in refusing to reinstate such employees, unless it *affirmatively* appears that such misconduct did not in fact occur. We thus hold that once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct." [Emphasis in original.] Since *Rubin Brothers,* the rule has been applied by the Board in numerous cases, including those where the protected activity involved was activity other than a strike.[6]

In sum, the Board's view is that it has the authority to find that a discharge was an unfair labor practice, despite its failure affirmatively to find an anti-union motive for the discharge, where the Gen-

[6] See, *e.g.*, *Metal Blast, Inc.*, 139 NLRB 540, 541, 544–545; *Simmons, Inc.*, 134 NLRB 1038, 1053–1054; *Stewart Hog Ring Co.*, 131 NLRB 310, 313, 336; *Bonnar-Vawter, Inc.*, 129 NLRB 127, 138; *The Patterson-Sargent Co.*, 115 NLRB 1627, 1631, 1666, 1674–1675; *Fry Products*, 110 NLRB 1000, 1004; *Longview Furniture Co.*, 100 NLRB 301, 305; *Porto Rico Container Corp.*, 89 NLRB 1570, 1575–1576.

eral Counsel demonstrates (1) that an employee was fired who the employer knew was engaging in protected activity, (2) that the reason for the discharge was the allegation that he committed an act of misconduct in the course of that activity, and (3) that, in fact, the employee was not guilty of the alleged misconduct. The Board's rule has been upheld by the Courts of Appeals for the Third, Fourth and Sixth Circuits;[7] it has been rejected only by the Fifth Circuit, both on one prior occasion[8] and in the instant case.

A. *The Board reasonably determined that the discharges in this case violated Section 8(a)(1)*

The Board's order in this case was a proper exercise of its power under Section 8(a)(1) of the Act to prevent undue interference with employee freedom to engage in concerted activity. The initial inquiry where a violation of Section 8(a)(1) is charged is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). The Board's rule in this case is a reasonable response to such potential interference.

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[7] *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C.A. 3); *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), certiorari denied, 347 U.S. 935; *National Labor Relations Board* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 53–54 (C.A. 6).

[8] *Rubin Bros. Footwear* v. *National Labor Relations Board*, 203 F. 2d 486 (Rives, J., dissenting).

When an employee is mistakenly discharged for alleged misconduct while engaging in protected activity, the effect upon the free exercise of employee rights is likely to be substantial—much more substantial than when a union member is routinely discharged for poor working performance. An employee who has been incorrectly discharged for engaging in protected activity would normally conclude that the union activity was the motivating cause of the discharge, while he would not be likely to give much credence to his employer's assertions that the discharge was motivated by misconduct which, as the employee knows, never occurred. Predictably, the discharged employee's fellow workers would accept his true version of the incident, rather than the employer's, and have a similar reaction. The Board was entitled to find that, as a result, employees would very likely be more hesitant to engage in future protected activity in a plant where one of their number has mistakenly been discharged for alleged misconduct committed in the course of protected activity. Even should some credence be given to the employer's claims of "good faith" in such cases, the Board could find that employees would nevertheless be deterred, for they would realize that, when they engage in union activity, they run the risk of losing their jobs not only if they actually engage in misconduct, but also if their employer is led to believe that misconduct occurred. Such a "good faith," but mistaken, employer belief is more than a theoretical risk, for union activity engenders strong emotions and active rumors, and the possibility of employer mistakes is substantial.

We recognize, of course, that a tendency to interfere with the free exercise of employee rights under

the Act is not the final test of illegality under Section 8(a)(1). In order to accommodate Section 8(a)(1) with other legitimate interests (see *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798), employer action which actually tends to interfere with concerted activity is lawful if it can be shown both that the employer was innocent of anti-union bias and also that he was motivated by business considerations which, on balance, prevail over the employee rights involved. Cf. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228–229. In most cases an employer's interest in discharging employees who he believes are guilty of misconduct is properly deemed sufficient to outweigh any consequential interference with organizational activities. The rule at stake in this case, however, is confined to situations in which the alleged misconduct is inextricably entwined with concerted activities; indeed, the typical case of this kind is one in which the alleged misconduct was a mistake in the manner of conducting the concerted activities. In such cases, while the employer may be innocent of anti-union bias, his interest in preserving his mistaken decision is insufficient to justify the interference with employee freedom to engage in collective activity in the course of a labor dispute. See Mr. Justice Harlan, concurring in *Local 357, Teamsters Union* v. *National Labor Relations Board*, 365 U.S. 667, 677.

Moreover, the Board's rule, confined as it is to situations in which the alleged misconduct is part of the concerted activities, does not interfere with manage-

ment prerogatives as seriously as might initially appear. The cases in which the Board's rule applies are not cases where an employee has been fired for reasons which management is uniquely equipped to appraise, for example, where a union leader is an inefficient workman. In such a case the Board would defer to management's decision regarding the employee's efficiency and would find an unfair labor practice only if it found that the employer's anti-union bias, rather than the workman's inefficiency, was the motivating factor. Where questions of judgment closely touching the proper operation of the plant are thus involved, there is real value in permitting the employer to make an "honest" decision which is not subject to "second-guessing." In the cases to which the Board's rule applies, on the other hand, the discharge has turned not on any question of management's business judgment, but on a specific question of fact concerning the manner of carrying on union activity, *e.g.*, whether the employee, as in this case, made a particular threat against company property at a given time. The Board is at least as competent as the employer to decide this question, particularly where, as here, the employer has made no effort fully to investigate the facts. Once the Board has decided that the alleged threat did not occur, no compelling management interests are damaged by ordering reinstatement since the employer no longer has any legitimate reason to exclude the worker from the plant.[9] By rejecting the Board's

[9] In this case, the Board awarded the discharged employees both reinstatement and back pay. We do not suggest, however, that the Board would necessarily be obliged to grant the same

rule, the court of appeals would, however, give the employer the final say as to whether an act of misconduct actually occurred, even though the employer failed to make a thorough investigation, even though there is no longer any good reason to exclude the employee from the plant and even though the employer's mistaken action would be likely to have a serious impact on the exercise of employee rights.[10]

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remedy in every case. Under Section 10(c) of the Act, it has considerable discretion with regard to the remedy to be imposed. In considering whether back pay as well as reinstatement should be awarded it could, for example, take into account in an appropriate case the fact that the employer acted only after a careful investigation. The Board was not called upon to exercise such discretion in this case, for it legitimately found that respondent had acted both precipitously and for an improper motive. See *infra*, pp. 31–34.

[10] This analysis does not overlook the provision in Section 10(c) of the Act that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." The fact that a threat to dynamite the plant would ordinarily justify a discharge and that such threat was the asserted reason for respondent's action does not necessarily make its action "for cause" within the meaning of Section 10(c). The legislative history of the provision, which was added to the Act in the Taft-Hartley amendments of 1947, shows that it was intended merely to emphasize the principle that, if an employee was indeed discharged for good cause, he was not to be reinstated or awarded back pay. The provision did not attempt to define "good cause" but recognized "the existing provision of law" which left it to the Board, on the facts of each case, to determine whether the cause assigned in fact existed or was legally sufficient. See 93 Cong. Rec. 6518, 2 Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948), 1593–1595; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4). What constitutes "cause" is thus not left wholly in the employer's discretion, but turns on the Board's reasonable judgment in

Consider, moreover, the consequences should the Board be compelled to adopt the position affirmatively advanced by the court of appeals, namely, that a "good faith belief" that an employee has engaged in misconduct in the course of a protected activity "is sufficient reason to discharge him no matter what the circumstances" (R. 217–218). The court below found that the employer here was in "good faith" when he accepted the unsupported allegation of Pate that Davis and Harmon had threatened to dynamite the plant and thereupon fired Davis and Harmon without engaging in further investigation. If, as the court held, such employer conduct were sufficient to immunize the employer from unfair labor practice charges in the absence of an affirmative Board finding of anti-union motivation, an enormous temptation would be

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light of the circumstances. See *National Labor Relations Board* v. *Thayer Company*, 213 F. 2d 748, 753, n. 6 (C.A. 1), certiorari denied, 348 U.S. 883. In the present case, the Board has determined, for the valid reasons set forth above, that, when an employer mistakenly discharges an employee for non-existent misconduct in the course of a protected activity, there is insufficient justification for the resultant invasion of employee rights which would occur. There is thus no "cause" within the meaning of Section 10(c). As the Court pointed out in *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 17, in rejecting the contention that a discharge in violation of a plant rule was "for cause" and thus privileged under Section 10(c):

"* * * But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained."

placed in the way of employers involved in labor disputes to seize upon rumors of alleged misconduct by union leaders engaged in protected activity as a pretext for their discharge. The danger of successful pretexts would simply be too great if the Board's power thus turned inexorably upon findings of subjective "good faith." In these circumstances the Board justifiably insists that the legality of a discharge turn not upon subjective "good faith" but upon whether the discharge was, in fact, based upon actual misconduct."

In short, to discharge an employee under the good faith, but mistaken, belief that conduct occurred in the course of union activity which deprived it of its protected character tends seriously to interfere with the exercise of that activity, and any business justification which exists for privileging such interference

[11] This is not to say that other alternatives were not potentially available to the Board in dealing with these cases. For example, the Board might conceivably have continued to attempt to rely solely upon affirmative findings that employers were, in fact, motivated by anti-union bias. The very fact that the employee was actually engaged in concerted activities at the time of the alleged misconduct would naturally tend to make one more skeptical of motives. In many cases, however, there might simply be no evidence to support such an affirmative finding; it would simply be a guess. Alternatively, the Board might conceivably have relied instead upon its ability to scrutinize assertions of "good faith" and to evolve principles under which precipitous employer action or action taken after inadequate investigation—as in this case—would not qualify as action taken in "good faith." The question before the Court, however, is not whether other approaches may have been available to the Board, but whether the approach actually adopted is a reasonable accommodation of the conflicting interests in light of the statutory policy. We submit that the Board's rule is such a reasonable accommodation.

is far outweighed by the competing employee interests. As the Fourth Circuit stated in *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91, certiorari denied, 347 U.S. 935: [12]

> * * * the employee is harmed whether the denial of reinstatement results from the employer's mistake or from his blameworthy animus. In either case, the striker has nevertheless lost his job.
>
> It is true where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind the harm suffered by the employee. While the employer's attitude may not be censurable, the employee too is free of blame. As between the victim of the mistake and the person who made the mistake, it seems just that the perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it. * * *

In protecting the right to strike and to engage in concerted activity, in Sections 7 and 13 of the Act, Congress intended to afford employees a firm guarantee.[13] Under the holding of the court below, the

[12] In *Industrial Cotton*, the employer denied reinstatement to an unreplaced economic striker under the good faith, but mistaken, belief that he had thrown tacks on the street in front of the plant. The Fourth Circuit, accepting the Board's finding that this striker was innocent of the misconduct, agreed that the denial of reinstatement was violative of Sections 8(a) (1) and (3) of the Act, irrespective of the employer's good motive.

[13] This Court has only recently reemphasized Congress' repeated solicitude for the right to strike. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233–235.

statutory protection would not be such "a firm and clear guarantee" but "one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information." *Industrial Cotton Mills, supra,* 208 F. 2d at 91. This view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind." *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 902 (C.A. 3).[14]

Finally, the Board's approach is in keeping with the interpretation given the Act in related situations. In *International Ladies' Garment Workers Union (Bernhard-Altmann)* v. *National Labor Relations Board,* 366 U.S. 731, this Court held that the employer violated Sections 8(a) (1) and (2) of the Act by according exclusive recognition to, and entering into a contract with, a union at a time when it represented only a minority of the employees, rejecting the contention that the action was excused by the employer's good faith belief that the union represented a majority. In words equally applicable here, the Court stated (pp. 738–739):

> The petitioner, while taking no issue with the fact of its minority status on the critical date, maintains that both Bernard-Altmann's and its own good-faith beliefs in petitioner's

[14] In *Cusano*, the Third Circuit, in agreement with the Board, held that the employer violated the Act by discharging an employee under an honest, but erroneous, belief that he had deliberately lied about the extent of the employer's profits in reporting to a union committee about preparation for a Board election.

majority status is a complete defense. To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved. The act made unlawful by Section 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith. [Footnotes omitted.]

B. *The discharges here also violated Section 8(a)(3) of the Act*

The Board believes that the discharges of employees Davis and Harmon in this case may also be viewed as a violation of Section 8(a)(3) of the Act, which makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." In stating this alternative argument, we note that, in the circumstances of this case, all elements which would be required, on the Board's theory, to make out a violation of Section 8(a)(3) would also establish a plain breach of Section 8(a)(1).

There are two elements to the offense of violating Section 8(a)(3): (1) an unpermitted "discrimination"; and (2) resulting unjustifiable encouragement or discouragement of union membership. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 42–43; *Local 357, Teamsters Union* v. *National Labor Relations Board*, 365 U.S. 667, 674–676. As shown in the preceding portion of this brief, the second element—unjustifiably discouraging union activity—was clearly present here. The Board submits that it could reasonably find that discrimination within the meaning of this section was likewise present.

As we have noted, the typical case in which Section 8(a)(3) comes into play is one where the employer asserts that he discharged an employee for poor work while the employee alleges that he was discharged because of union activity. In this situation, the Board will ascertain the "real motive" for the employer's action. If the Board finds that the employer based his action on the employee's union activity, it is easy to conclude that the requisite impermissible "discrimination" was present: The employer singled out the discharged employee *because of* the employee's union affiliation, and it is a fair inference that he also acted *in order to discourage* union activity.

The Court, however, has also sustained findings of "discrimination" under Section 8(a)(3) in cases where neither of these motivational elements was present. In *Republic Aviation Corp.* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Le Tourneau Co. of Georgia*, 324 U.S. 793, 795, 797, employees distributing union literature at

two plants were discharged for violating company rules which prohibited soliciting of any type in the plants. The Board found in both cases that the discharges were made in pursuance of unbiased enforcement of the no-solicitation rules, without discrimination on the part of the employer toward union activity. The no-solicitation rules themselves had not been adopted to deal with union activity but were motivated by broader business considerations. Nevertheless, the Court held that the Board was justified in finding violations of Section 8(a)(3) in both cases. In *Gaynor News Co.* v. *National Labor Relations Board*, 347 U.S. 17, 36, 37, decided in the same opinion with *Radio Officers* v. *National Labor Relations Board, supra*, the employer granted retroactive wage increases to union members but withheld the same benefits from other employees in the unit who were not members of the union because "it was not contractually bound to do so, and, in its business judgment, did not choose to do so." The employer "acted from self-interest and not to encourage unionism," and there was some basis for the employer's belief that he was contractually bound to pay the benefits to union members and no one else. The Court again affirmed a finding that Section 8(a)(3) had been violated. In *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, the employer granted superseniority benefits to replacements for strikers and to strikers who were willing to abandon the strike and resume work. The employer asserted, and the Board did not find otherwise, that its purpose was not to penalize the strikers

but to keep the plant operating. Nevertheless, the Court held that Section 8(a)(3) was violated.

The concept of "discrimination" within the meaning of Section 8(a)(3) is therefore not readily susceptible of abstract definition. The foregoing cases establish that the Act does not prohibit only discrimination *in order to discourage or encourage* unionism; it is sufficient if the discrimination has the effect or potentiality to discourage or encourage union activity without being designed to do so. They also establish that "discrimination" need not necessarily be *on the basis* of union activity—*i.e.*, union activity need not be the motivating reason for different treatment. The words of the Act alone are of little help, for while they broadly prohibit an employer "by discrimination" "to encourage or discourage membership in any labor organization," they do not describe which reasons for acting differently toward some employees constitute "discrimination" and which do not.[12]

One thread which does run through the foregoing cases in this Court, which is also contained in the present case, is that employees have been rewarded or penalized *as a direct result of their participation in*

[12] In a recent case, Judge Friendly has suggested (*National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172, 180, 181 (dissenting opinion)) that "discrimination" within the meaning of Section 8(a)(3) may well mean "to distinguish or differentiate without sufficient reason." An employer would thus violate Section 8(a)(3) when he singles out an employee or group of employees for special treatment with no reason or with reasons found insufficient by the Board, with the consequent result of discouraging union activity. Such an approach would lead to a finding of discrimination in this case.

or abstention from protected union activity.[16] In *Republic Aviation, supra,* for example, the employer acted merely to preserve its broad no-solicitation rule, but the result was that employees were fired as the direct consequence of their engaging in protected union solicitation. In *Gaynor News Co., supra,* and *Erie Resistor, supra,* benefits and disabilities also flowed to employees, regardless of their employers' motives, as the direct result of their engaging in or refraining from union activity. In the present case, if threats of violence had actually been made, it could not be said that Davis and Harmon were fired as a direct consequence of protected union activity, for the threats would have made their solicitation unprotected. However, since there were no threats in fact, Davis and Harmon were indeed fired, as in *Republic Aviation,* as a consequence of their engaging in protected union solicitation.[17]

[16] *Local 357, supra,* is not to the contrary. There the union and employer had an agreement requiring the employer to hire exclusively through hiring halls operated by the union. A union member obtained employment independently of the hiring hall and he was, for that reason, discharged. The Board found violations of Sections 8(a)(1) and (3) on the ground that the hiring-hall agreement was *per se* unlawful. The Court reversed, holding that an exclusive hiring-hall agreement between an employer and a union was not *per se* unlawful under the Act. Since the employee therefore did not have a protected right to obtain employment free of such a hiring procedure, he was not discharged as a result of his participation in protected activity.

[17] The principal remaining factual difference between *Republic Aviation, Gaynor News* and *Erie Resistor* on the one hand, and the present case on the other, is that in this case the employer acted on the basis of factual assumptions which were mistaken but which, if true, would have immunized his conduct from unfair labor practice charges. For the reasons set forth, the Board submits that this difference is irrelevant here.

As we have shown, pp. 11, 14–15, *supra*, where employees are thus fired as the direct result of their participation in protected activity, many of the industrial consequences of deliberate anti-union discrimination are present. For example, from the point of view of the discharged employee, he has been punished for merely engaging in protected activity, and, whatever the employer's subjective motivation, it will be natural for the employee to conclude that he was discriminated against *because of* that activity and to react accordingly. The impact upon fellow employees of the discharged worker would be similar. Nor in such cases is there any way to be certain that the employer would have viewed the alleged misconduct as seriously if it had not taken place in the course of protected activity.

Therefore, the Board submits that this Court's prior decisions respond to the industrial realities and permit the Board to act under Section 8(a)(3) where, because the discharges flowed directly from participation in or abstention from protected union activity, the effects of the employer's actions are comparable to those present in cases characterized by conscious anti-union bias. In the present case, where employees were unjustifiably fired for conduct which was alleged to take place in the course of protected activity, the Board believes that the nexus between the cause of the discharge and union activity was sufficient to satisfy the Act.[18]

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[18] Since the employer here knew that the alleged misconduct occurred in the course of union activity, the Board submits that

The conclusion that the Board's power to find violations of Section 8(a)(3) thus extends to this case is confirmed by this Court's frequent citation, in connection with its discussions of Section 8(a)(3), of *National Labor Relations Board* v. *Industrial Cotton Mills, supra,* and *Cusano* v. *National Labor Relations Board, supra,* where the Board applied the same rule involved in this case. Thus in *Radio Officers, supra,* the Court cited those two cases in support of the proposition that both "the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement" of Section 8(a)(3) without "specific evidence of intent to en-

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it may also be said that he "intended" to intrude into that activity, albeit under the mistaken belief that it had become unprotected. An analogy is suggested by cases where one charged with an intentional tort, such as battery, defends his conduct by showing that he was acting under a misapprehension as to some fact, such as the identity of the victim, which caused him to believe that he had a right to act as he did. The courts have uniformly rejected this defense. See 1 Harper & James, *The Law of Torts*, p. 218:

"It has been seen that to constitute a battery a defendant's conduct must be characterized by the factor of intent. But it is necessary to analyze the mental element more minutely. All that is necessary is (a) that the actor engage in volitional activity and (b) that he intend to violate the legally protected interest of another in his person. The distinction is at once drawn between accident and mistake. If the actor intends to inflict a harmful or offensive contact on the plaintiff, it is no defense that he does so under a mistaken belief as to the plaintiff's identity, or in the belief that he is privileged to do so. Since he intends the invasion of another's interest, he takes the risk of the existence of a legal privilege to make it; it is no defense that the mistake is reasonable and due to no fault or negligence on the part of the actor. As in other cases of mistake, he must bear the losses incident thereto * * *." [Footnotes omitted.]

courage or discourage" (347 U.S. at 44–45, n. 53).[19] In *Local 337, Teamsters Union, supra,* Mr. Justice Harlan, in his concurring opinion, cited *Cusano* and *Industrial Cotton* as an exception to the general rule that "an affirmative showing of a *motivation* of encouraging or discouraging union status or activity" is required to establish a violation of Section 8(a)(3), and explained that the "absence of a significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation" in those cases (365 U.S. 667, 678). And, in *Erie Resistor, supra,* the Court, after pointing out that conduct which is inherently discriminatory may be found unlawful despite the employer's "good" motive, cited, *inter*

[19] The Court also cited *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435 (C.A. 7); and *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847 (C.A. 8). *Allis-Chalmers* involved a situation where, after a union had been selected for a bargaining unit consisting of rank-and-file employees and inspectors, the employer, allegedly motivated by the consideration that inclusion of inspectors in the same bargaining unit would have an adverse effect on production, reclassified the inspectors' jobs and limited their functions; the Board found and the court agreed that the employer's alteration of the bargaining unit was violative of Sections 8(a) (1) and (3) of the Act notwithstanding his asserted business justification. *Gluek Brewing* involved a situation where the employer, motivated by a desire to avoid a disruption and loss of business threatened by the Teamsters, discharged his own drivers, represented by the Brewers, and subcontracted out the trucking operation to a company represented by the Teamsters; the Board found and the court agreed that the employer's action was violative of Sections 8(a) (1) and (3) notwithstanding his business justification.

alia, Cusano and *Industrial Cotton* (373 U.S. at 229, n. 8).[20]

C. *The Board's order was, in any event, proper in the particular circumstances of this case*

We have shown that the Board's order in this case was correct as an application of the principle that, regardless of the employer's "good faith," it is an unfair labor practice mistakenly to discharge an employee for alleged misconduct occurring in the course of protected activity. It is appropriate, in addition, to present briefly three alternative bases, peculiar to this case, upon which the Board's order should, in any event, be sustained.

1. Even if, as the court of appeals held, employer "good faith" is a complete defense to unfair labor practice charges growing out of mistaken discharges, the facts accepted as true by the court of appeals in this case would not, under any proper view, constitute "good faith." The court of appeals assumed that respondent's motivation for discharging Davis and Harmon was its "honest belief," based solely upon Pate's allegations, that the men had threatened to dynamite company property; "the intent was to rid the plant of those from whom the threat was

[20] See, also, *International Ladies' Garment Workers' Union (Bernhard-Altmann)* v. *National Labor Relations Board*, 366 U.S. 731 (pp. 22–23, *supra*), where the Court, in rejecting the contention that the employer's action in according exclusive recognition to a minority union was not excused by his good faith, but mistaken, belief that the union represented a majority, stated that, "prohibited conduct cannot be excused by a showing of good faith," citing, *inter alia*, *Industrial Cotton* (*id.*, at 739, n. 12).

believed to have emanated." (R. 214.) Even if those were the facts—and we submit, *infra*, that they were not—the conclusion of "good faith" was unwarranted. "Good faith" in such a situation would require, at least, some investigation of the charges. An "honest belief" alone, based upon no real attempt to find the truth, will not suffice. Yet respondent made no attempt to go beyond Pate's story. Neither Davis nor Harmon was interviewed before his discharge nor given opportunity to answer the charges against him. Moreover, Pate's two separate versions of the incident were inconsistent in a vital respect: At first he orally attributed the threatening remarks to Harmon; in a subsequent signed statement, after an interview with respondent's counsel, he attributed the remarks to Davis. (R. 210.) In these circumstances, respondent cannot claim a "good faith" exemption without a more serious effort to ascertain the truth before taking action.

2. The court of appeals erred in assuming that respondent's "motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated." (R. 214.) This assumption was directly contrary to the Board's finding of fact that the allegations of misconduct were merely a pretext for discharging the men because of their union activity. The Board found:

> It is undisputed, and Respondent knew, that the alleged misconduct was asserted to have taken place while Davis and Harmon were engaged in protected union activity, the solicitation of union membership and authorization

> cards. In view of this knowledge and in view of the fact that these employees were laid off discriminatorily because of Respondent's desire to rid itself of employees who it knew were leaders in the protected concerted activity, *we can only conclude that, because of their union activity, Respondent seized up their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges.* [Emphasis added.] (R. 61.)

The court made no attempt to explain its departure from the Board's findings. The Board's conclusions seem to have been supported by ample evidence, to wit, the Board's conclusions (i) that respondent had, shortly before, discriminatorily laid off Davis and Harmon for their union activity and (ii) that respondent had acted upon Pate's unsupported allegations without any attempt at further investigation. In any event, the court acted improperly in rejecting the Board's factual conclusions without reasons to support its action.

3. As noted in the previous paragraph, the Board found, and the court of appeals agreed, that, shortly prior to discharging these employees, respondent had violated Section 8(a)(1) of the Act by laying off Davis, Harmon and McKnight because of their leadership in concerted activity to obtain a wage increase. Respondent's discharges of Davis and Harmon came while those two employees were still in lay-off status. Even if no impropriety had been connected with the discharges when viewed in isolation, the Board would nevertheless have been entitled to order the reinstatement with back pay of

Davis and Harmon as a remedy for their previous discriminatory layoffs. Regardless of the effect of employer "good faith" mistakes in other circumstances, the Board, as an exercise of its remedial power under Section 10(c), is entitled to insist that such improperly laid-off employees be reinstated unless they actually engage in misconduct. Compare *National Labor Relations Board* v. *Thayer Company*, 213 F. 2d 748, 753 (C.A. 1), certiorari denied, 348 U.S. 883; *Local 833, United Automobile Workers* v. *National Labor Relations Board and Kohler Co.*, 300 F. 2d 699, 702–704 (C.A.D.C.) certiorari denied, 370 U.S. 911.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with directions to enforce the Board's order in full.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
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> * * * * *

SEC. 10. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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